

UNFAIR FOREIGN COMPETITION ACT OF 1985

MAY 13 (legislative day, MAY 12), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1655]

The Committee on the Judiciary, to which was referred the bill (S. 1655) to amend the Unfair Competition Act of 1916 and Clayton Act to provide for private enforcement of the Unfair Competition Statute in the event of unfair foreign competition, and to amend title 28 of the United States Code to provide for private enforcement of the Customs Fraud Statute, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE

The bill, S. 1655, proposes to amend the Unfair Competition Act of 1916 and Clayton Act to provide for private enforcement of the Unfair Competition statute in the event of unfair foreign competition, and to amend title 28 of the United States Code to provide for private enforcement of the Customs fraud statute. These amendments would:

(1) permit private civil rights of action in Federal court to enforce laws against dumping, subsidy, and customs fraud;

(2) permit injunctive relief against continued illegal importation; and

(3) provide damages for injuries sustained.

The Clayton Act (15 U.S.C. 12) protects trade and commerce against unlawful restraints and monopolies; the Unfair Competition Act of 1916 (15 U.S.C. 72) prohibits the importation of dumped or subsidized articles; and the Tariff Act of 1930 (15 U.S.C. 1202) sets the tariff schedules and provides for the customs treatment of imported goods.

II. TEXT OF S. 1655 AS REPORTED

[S. 1655, 99th Cong., 1st sess.]

A BILL To amend the Unfair Competition Act of 1916 and Clayton Act to provide for private enforcement of the Unfair Competition statute in the event of unfair foreign competition, and to amend title 28 of the United States Code to provide for private enforcement of the Customs fraud statute

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Unfair Foreign Competition Act of 1985".

SEC. 2. Section 1 of the Clayton Act (15 U.S.C. 12) is amended by inserting after the words "nineteen hundred and thirteen;" the words "section 801 of the Act of September 8, 1916, entitled 'An Act to raise revenue, and for other purposes' (39 Stat. 798; 15 U.S.C. 72);".

SEC. 3. (a) Section 801 of the Act of September 8, 1916 (39 Stat. 798; 15 U.S.C. 72) is amended to read as follows:

"SEC. 801. (A) No person shall import or sell within the United States any article manufactured or produced in a foreign country if:

"(1) such article is imported or sold within the United States at a United States price which is less than the foreign market value or constructed value of such article; and

"(2) such importation or sale—

"(i) causes or threatens material injury to industry or labor in the United States, or

"(ii) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

"(B) Any interested party who shall be injured in his business or property by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against any manufacturer or exporter of such article or any importer of such article into the United States who is related to such manufacturer or exporter.

"(C) In any action brought under subsection (B), upon a finding of liability on the part of the defendant, the plaintiff shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question; or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

"(3) recover the costs of the action, including reasonable attorney's fees.

"(D) The standard of proof in any action filed under this section is a preponderance of the evidence. Upon a prima facie showing of the elements set forth in subsection (A), or upon a final determination adverse to the defendant by the Department of Commerce or the International Trade Commission under section 735 of the Tariff Act of 1930 (19 U.S.C. 1673d) relating to imports of the article in question for the country in which the manufacturer of the article is located, which final determination shall be considered a prima facie case for purposes of this Act, the burden of rebutting such prima facie case thus made shall be upon the defendant.

"(E) Whenever it shall appear to the court that justice requires that other parties be brought before the court, the court may cause them to be summoned, without regard to where they reside, and the subpoenas to that end may be served and enforced in any district of the United States.

"(F) The acceptance by any foreign manufacturer, producer or exporter of any right or privilege conferred upon him to sell his products or have his products sold by another party in the United States shall be deemed equivalent to an appointment by the foreign manufacturer, producer, or exporter of the District Director of the United States Customs Service of the Department of the Treasury for the port through which the article is commonly imported to be the true and lawful agent upon whom may be served all lawful process in any action brought under this section.

"(G)(1) An action may be brought under this section only if such action is commenced within four years after the date on which the cause of action accrued.

"(2) The running of the statute of limitations provided in paragraph (1) shall be suspended while any administrative proceedings under section 731, 732, 733, 734, or 735 of the Tariff Act of 1930 (19 U.S.C. 1673-1673d) relating to the importation in question, or any appeal of a final determination in such proceeding, is pending and for one year thereafter.

"(H) If a defendant in any action brought under subsection (B) fails to comply with any discovery order or other order or decree of the court, the court may—

"(1) enjoin the further importation into, or the sale or distribution within, the United States by such defendant of articles which are the same as, or similar to, those articles which are alleged in such action to have been sold or imported under the conditions described in subsection (B) until such time as the defendant complies with such order or decree, or

"(2) take any other action authorized by law or by the Federal Rules of Civil Procedure, including entering judgment for the plaintiff.

"(I)(1) Except as provided in paragraph (2), the confidential or privileged status accorded by law to any documents, evidence, comments, or information shall be preserved in any action under this section.

"(2) The court in any action brought under this action may—

"(A) examine, in camera, any confidential or privileged material,

"(B) accept depositions, documents, affidavits, or other evidence under seal, and

"(C) disclose such material under such terms and conditions as the court may order.

"(J) Any action brought under this section shall be advanced on the docket and expedited in every way possible.

"(K) For purposes of this section—

"(1) The terms 'United States price', 'foreign market value', 'constructed value', 'subsidy', and 'material injury', shall have the respective meaning given such terms by title VII of the Tariff Act of 1930.

"(2) If—

"(A) a subsidy is provided to the manufacturer, producer, or exporter of any article, and

"(B) such subsidy is not included in the foreign market value or constructed value of such article (but for this paragraph),

the foreign market value of such article or the constructed value of such article shall be increased by the amount of such subsidy.

"(L) The court shall permit the United States to intervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

"(M) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702)."

SEC. 4. It is the sense of the Congress that the provisions of this section are consistent with, and in accord with, the General Agreement on Tariffs and Trade (GATT).

SEC. 5. Chapter 95 of title 28 of the United States Code is amended by adding at the end thereof the following new section:

"§ 1586. Private enforcement action

"(a) Any interested party who shall be injured in his business or property by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. 1592) may bring a civil action in the district court of the District of Columbia or in the Court of International Trade, without respect to the amount in controversy.

"(b) Upon proof by an interested party that he has been damaged by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930, such interested party shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into the United States of the articles or products in question; or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

"(3) recover the costs of suit, including reasonable attorney's fees.

"(c) For purposes of this section—

"(1) The term 'interested party' means—

"(A) A manufacturer, producer, or wholesaler in the United States of a like or competing product, or

"(B) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product or a competing product in the United States;

"(2) The term 'like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930; and

"(3) The term 'competing product' means a product which competes with or is a substitute for products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930.

"(d) The court shall permit the United States to intervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

"(e) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702)."

III. HISTORY OF LEGISLATION

The Senate considered efforts in the 96th Congress to provide a private right of action by amending the Antidumping Act of 1921 (19 U.S.C. 160-171), the Tariff Act of 1930 (15 U.S.C. 1202), and section 801 of the Revenue Act of 1916 (15 U.S.C. 72).

On January 25, 1979, Senator John Danforth introduced S. 223, which would have permitted individuals injured by the sale of goods at less than fair value to sue for treble damages.

The Senate Finance Subcommittee on International Trade held a hearing on the provisions of this bill on March 11, 1980. No further committee action occurred on this bill.

On March 4, 1982, Senator Arlen Specter introduced S. 2167, in response to the impact of unfair foreign trade practices, particularly on the American steel industry. This legislation would have provided a private right of action in Federal court to enforce existing laws prohibiting illegal dumping or subsidizing of foreign imports.

On May 11, 1982, Senator Charles McC. Mathias introduced S. 2517, which would have amended the antitrust laws to include dumping, and eliminated the need to prove intent to injure before any damages could be collected by an injured United States party.

The Judiciary Committee held hearings on these two bills on May 24 and June 24, 1982. The hearings focused on the problems of dumping in the United States by foreign producers and the provisions of S. 2167 and S. 2517. The Judiciary Committee did not act on either bill. Senator Specter offered S. 2167 in modified form as an amendment to the "Buy America" amendment (unprinted No. 1448) to the gas tax bill, H.R. 6211, on December 15, 1982. Both

amendments were tabled; the Specter amendment was tabled by a vote of 51 to 47.

Senator Mathias reintroduced S. 2517 as S. 127 on January 26, 1983. Senator Specter reintroduced S. 2167 with several modifications as S. 418 on February 3, 1983.

On March 21, 1983, the Judiciary Committee held hearings on the two bills. There was no further Committee action on either bill.

Senator Specter offered the text of S. 418 as an amendment (No. 4282) to the Omnibus Tariff Bill, H.R. 3398, on September 19, 1984. The amendment was tabled by a vote of 61 to 36.

On January 22, 1985, Senator Specter reintroduced S. 418 as S. 236. This bill currently is pending in the Judiciary Committee.

On September 18, 1985, Senator Specter introduced S. 1655, which includes the text of S. 236 modified to extend the private right of action to U.S. parties injured by Customs fraud. The Judiciary Committee held a hearing on S. 1655 on November 20, 1985. The Judiciary Committee considered S. 1655 on March 20, 1986, and by voice vote without objection ordered it favorably reported.

IV. NEED FOR LEGISLATION

A. CREATION OF A PRIVATE RIGHT OF ACTION

The unlawful dumping of foreign goods, which involves sales in the United States at artificially low prices, has become a serious threat to American industries. Enormous quantities of dumped and subsidized products, and articles which violate the Customs laws, enter the United States each year. Enforcement of existing laws prohibiting such illegal imports is insufficient, not being enforced, resulting in increasing injury to domestic companies. Thousands of American jobs are lost each year, largely because of illegal imports.

The Federal Government reports that Custom fraud is rampant with regard to textiles, apparel, computer software, hand tools, sugar, electronics, automotive products, chemicals, petrochemicals, agricultural products, pharmaceutical products, and other industries. Illegal dumping is severely injuring American steel, chemical, glass, textile, electronics, agriculture, rubber and cement industries, among others. Foreign subsidies injure American manufacturers of footwear, steel, textiles, apparel, glass, wool, leather, tires, cement, sugar, iron, railway cars, and other products.

This bill would address this problem by permitting injured American businesses to file suit in Federal court and seek injunctions against, and appropriate damages for, continued illegal importation of foreign goods.

During the November 20, 1985 Committee hearing, representatives of various domestic industries, including steel, textiles, and apparel, strongly supported enactment of S. 1655 providing for a private right of action as an effective remedy to address unfair practices. Hearing witnesses also testified about the urgent need for private relief through the judicial system to supplement the current administrative process.

B. PROVISION OF INJUNCTIVE RELIEF

American industries under S. 1655 would be granted direct access to Federal court to seek swift injunctive relief against illegal imports. The availability to U.S. companies of injunctive relief would place foreign "dumpers" on notice that any investment in dumping in the United States could be lost instantaneously.

Under this bill, an injured domestic business could file suit in the U.S. District Court for the District of Columbia or the Court of International Trade for an injunction against the import and sales of the goods which it could preliminarily demonstrate were being dumped or subsidized. The court's order could be modified to provide a more permanent remedy based on a more detailed finding.

During the Judiciary Committee hearing on November 20, 1985, witnesses testified regarding the provision of the bill creating injunctive relief to halt illegal imports. Industry representatives indicated that, under existing law, a complaint about unfair dumped or subsidized imports must proceed through a costly and lengthy administrative procedure involving both the Commerce Department and the International Trade Commission; likewise, the Bureau of Customs is increasingly unable to cope with the rising incidence of customs fraud, primarily transshipments through third countries to circumvent a U.S. quota. Although injunctive relief would be a significant alternative to the current administrative process to halt illegal imports, the remedy of primary interest to the witnesses was the retroactive damages provision of the bill.

C. PROVISION OF DAMAGES

The availability of damages to U.S. companies, if dumping and injury are ultimately found to have occurred, will remove the illegally obtained profits of, and increase the cost of dumping for, importers and foreign exporters and producers. Foreign enterprises, like any domestic company, would be held responsible for the economic consequences of their anticompetitive actions.

The current regulatory scheme rarely imposes retroactive duties; it merely restricts future dumping.

This bill would allow domestic companies to recover damages for injuries sustained when injunctive relief cannot be timely provided or is otherwise inadequate.

During the Judiciary Committee hearing on November 20, 1985, witnesses testified that the bill's provision to seek damages for injury from illegal imports would provide a more effective deterrent than current law, would provide *retroactive* relief to fill the gap under existing law which imposes duties on only *future* imports, and would provide damage awards directly to the injured American industries. International trade lawyers also testified during the hearing that the provision of damages for injury sustained from illegal dumped or subsidized imports or customs fraud violations would be consistent with the General Agreement on Tariffs and Trade (GATT).

V. SECTION-BY-SECTION ANALYSIS

A. Section 1

Section 1 sets out the title of S. 1655 as the "Unfair Foreign Competition Act of 1985."

B. Section 2

Section 2 amends the Clayton Act (15 U.S.C. 12) by including the Unfair Competition Act of 1916 (15 U.S.C. 72) in its scope.

C. Section 3

Section 3 amends the provisions of section 801 of the Unfair Competition Act of 1916 (15 U.S.C. 72) by—

- (1) revising the prohibition against importing or selling foreign goods in the United States which are dumped or subsidized;
- (2) adding a private right of action for any injured party to file a civil action in the U.S. District Court in the District of Columbia or in the U.S. Court of International Trade against any manufacturer, exporter, or importer of illegally dumped or subsidized goods;
- (3) providing for an injunction against further importation into, or sale or distribution within, the United States of such goods by the defendant, damages, and court fees;
- (4) establishing the standard of proof as the preponderance of the evidence;
- (5) providing the court with the subpoena power in such cases;
- (6) recognizing the District Director of the U.S. Custom Service for the port through which the goods are generally imported as the agent of the foreign manufacturer, producer, or exporter to be served;
- (7) setting a 4-year statute of limitations, which would be suspended during administrative proceedings under the Tariff Act of 1930 or an appeal of a final determination;
- (8) allowing the court to issue an injunction or enter judgment for the plaintiff for non-compliance of a discovery or other court order;
- (9) ensuring the confidentiality of litigation materials;
- (10) expediting court review;
- (11) defining terms by the Tariff Act of 1930;
- (12) recognizing the rights of the United States to be a party; and
- (13) recognizing the President's existing power to nullify a court order under the International Emergency Economic Powers Act (50 U.S.C. 1702).

D. Section 4

Section 4 sets out the sense of the Congress that these provisions are consistent with the General Agreement on Tariffs and Trade (GATT).

E. Section 5

Section 5 amends Chapter 95 of title 28 of the United States Code (28 U.S.C. 1581-1585) by adding a new section 1586.

Section 1586 creates a private right of action to enforce the Customs statute by—

(1) allowing an injured interested party to bring a civil action in the U.S. District Court in the District of Columbia or in the U.S. Court of International Trade for a fraudulent, grossly negligent, or negligent violation of the Tariff Act of 1930;

(2) providing for an injunction against further illegal importation of such products and damages for injuries sustained;

(3) defining "interested party," "like product," and "competing product";

(4) recognizing the rights of the United States to be a party; and

(5) recognizing the President's existing power to nullify a court order under the International Emergency Economic Powers Act.

VI. AGENCY VIEWS

By letter dated February 18, 1986, from U.S. Trade Representative Clayton Yeutter to Strom Thurmond, Chairman of the Senate Committee on the Judiciary, the United States Trade Representative recommended against enactment of S. 1655.

U.S. TRADE REPRESENTATIVE,
Washington, February 18, 1986.

Hon. STROM THURMOND,
Chairman, Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: I am writing to express my strong opposition to S. 1655, a proposed amendment to the Antidumping Act of 1916. S. 1655 attempts to broaden current trade remedies by weakening the standards for antitrust liability under the 1916 Act and by creating a new private right of action for customs fraud.

While the Administration has studied S. 1655 carefully, we must continue to oppose the bill. The bill, if enacted into law, would violate the international obligations of the United States and expose U.S. exports to foreign retaliation. As a practical matter, we believe that S. 1655 is unnecessary and would add nothing to our current system of remedies for dumping and customs fraud.

At the outset, I want to emphasize that the Administration is deeply committed to the enforcement of the U.S. antidumping law. Recently, in the Trade and Tariff Act of 1984, Congress and the Administration joined to enact a series of important improvements in the U.S. unfair trade laws. I note that an earlier version of S. 1655 was rejected by the Senate during consideration of the 1984 Act.

S. 1655 is inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT) and the 1979 GATT Antidumping Code. The obligations of the Code relate to the fair and open operation of antidumping measures and were approved by the Congress in the Trade Agreements Act of 1979. Both the Code and

the GATT authorize a signatory to impose antidumping duties to counteract foreign dumping. This remedy represents a special exception to normal GATT rules regarding tariffs. The Code, however, expressly limits this remedy to the prospective collection of antidumping duties to offset the margin of dumping. It prohibits the use of additional sanctions, such as antitrust damages. In particular, Article 16 of the Code specifies that: "No specific action can be taken against dumping of exports from another Party except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."

S. 1655 would violate these provisions by authorizing a treble damages remedy on top of the normal collection of antidumping duties. In certain circumstances, S. 1655 would require a foreign company to pay four times for a single unfair act. S. 1655 would also violate the Code by authorizing the collection of unlimited retroactive damages for past dumping, instead of the essentially prospective remedy contemplated by the Code, and by authorizing the exclusion of imports from the United States as a discovery sanction. Since dumping is often inadvertent, many of our trading partners would regard S. 1655 as unnecessarily draconian and would feel compelled to retaliate against U.S. exports.

While many of the above objections can be levelled at the Anti-dumping Act of 1916, that act was "grandfathered" upon U.S. accession to the GATT and is therefore GATT-legal. By significantly amending the 1916 Act, S. 1655 would remove the protection of the GATT "grandfather clause," thereby further exposing U.S. exports to GATT-sanctioned retaliation.

While the bill attempts to address some of the potential international complications by authorizing the President to nullify an objectionable court order pursuant to the International Emergency Economic Powers Act (IEEPA), this provision would not solve the difficulties created by the bill. IEEPA authorizes the President to invoke extraordinary powers in the event of a "national emergency," but it is most unlikely that the President would declare such an emergency over a dumping or customs fraud case.

The bill is equally troubling from the standpoint of U.S. law. The essential premise of the bill is that an antitrust remedy in the federal courts would offer a more effective antidumping remedy to U.S. industries than current U.S. law. I disagree. Instead, the bill is likely to encourage endless and expensive antitrust litigation, the primary beneficiary of which is an array of lawyers engaged in discovery. Finally, while the bill attempts to accelerate the process by providing that the findings of the Commerce Department create a rebuttable presumption of violation of the 1916 Act, this provision could create serious due process problems, since the Commerce Department's streamlined antidumping proceedings currently are not subject to the Administrative Procedures Act.

In contrast, our current antidumping law offers U.S. firms a speedy and effective remedy against dumping practices. During the past five years, the Department of Commerce and the U.S. International Trade Commission have conducted more antidumping and countervailing duty investigations and issued more antidumping and countervailing duty orders than at any other time in the histo-

ry of the United States. In my view, both agencies have enforced the law vigorously and well.

We must also oppose the customs fraud provisions of S. 1655. The U.S. Customs Service is committed to the aggressive enforcement of the customs laws. Consequently, since the U.S. Department of Justice already has the authority to pursue fraudulent entries of goods under section 592 of the Tariff Act of 1930, there is no need for a private right of action. In addition, the GATT does not authorize the exclusion of goods because a company has negligently or fraudulently encouraged the entry of goods into the U.S. finally, the bill would appear to raise serious proximate cause problems. The fraudulent entry of goods clearly represents a loss to the United States Government. It is, however, often a good deal less clear whether a fraudulent or negligent entry necessarily results in direct and foreseeable harm to a private plaintiff. The fraudulent entry of a dozen widgets, for example, clearly results in a loss of revenue for the U.S. But it is wholly unclear whether such an entry necessarily results in harm to XYZ Co., particularly if there are several hundred other U.S. and foreign companies selling widgets in the U.S. and the amount of the duty is not prohibitive. Accordingly, the creation of a private right of action appears unlikely to result in practical benefits to U.S. firms.

For the foregoing reasons, I urge that S. 1655 not be enacted into law. The Office of Management and Budget advises that there is no objection to the submission of this comment from the standpoint of the Administration's program.

Sincerely,

CLAYTON YEUTTER.

By letter dated February 12, 1986, from Robert Kimmitt, General Counsel of the Department of the Treasury, to Strom Thurmond, Chairman of the Senate Judiciary Committee, the Treasury Department's General Counsel recommended against enactment of S. 1655.

DEPARTMENT OF THE TREASURY,
Washington, February 12, 1986.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Department of the Treasury on S. 1655, the "Unfair Foreign Competition Act of 1985."

We have a number of concerns with the bill. It assumes that existing dumping remedies are inadequate. However, the current regulatory scheme administered by the Department of Commerce and the International Trade Commission protects domestic industries by providing timely dumping investigations and the retroactive imposition of duties when "critical circumstances" are present.

The bill appears to be inconsistent with the General Agreement on Tariffs and Trade (GATT) and the Antidumping Code ("Code"). Both the GATT and the Code state that dumping remedies, other than duties equal to the dumping margin, are prohibited. For instance Article VI of the GATT prohibits "double counting." The

bill would violate this mandate by exposing importers to both antidumping duties and to antitrust liability for the same offense.

Both Article VI and the Code strictly limit the size of antidumping duties and require proof of material injury. In comparison, the bill's injury standard is weak and the potential damage liability is extensive. The bill's injury standard is of particular concern. While this standard would still require material injury in some cases, it would expand the standard to include the prevention, or partial prevention, of an industry's modernization. The impact upon industry modernization is not currently a consideration under either the GATT or the Code.

Additionally, S. 1655 would create a private right of action in both antidumping and Customs fraud cases by amending the Clayton Act and the Custom laws. The Department of the Treasury has previously raised concerns about the venue provisions and foreign policy ramifications of such amendments.

Section 5 of the bill would add a new section to title 28, United States Code, to provide that private domestic interested parties may bring a civil action in the Court of International Trade, or the District Court of the District of Columbia, if such parties have been damaged by a violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. 1592). The United States would have the right to intervene in any such suit.

Also, section 5 of the bill would result in criminal and civil litigation difficulties for this Department. Any private civil action alleging a violation of section 592(a) of the Tariff Act, while the Government is conducting a criminal or civil investigation into the matter, or a similar matter, could seriously jeopardize that investigation or proceeding. Similarly, the Government's need to intervene in private cases would result in added expense and administrative difficulties. This may adversely affect the efficient administration of the tariff laws, especially those relating to classification of value by the Customs Service.

Moreover, S. 1655 provides that the President, in order to protect our foreign policy interests, may nullify any objectionable court order under the bill by invoking the International Emergency Economic Powers Act ("IEEPA"). The IEEPA requires that a "national emergency" be declared in order for the President to exercise his emergency powers. It is extremely unlikely, however, that the President would declare a national emergency in an antidumping or a Customs fraud case.

Finally, the Department believes that violations of section 592, which often involve highly technical issues of customs law, should remain within the exclusive jurisdiction of the Court of International Trade and the Court of Appeals for the Federal Circuit, which are uniquely qualified to rule on such matters.

For the reasons stated, the Department of the Treasury is opposed to the enactment of S. 1655.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

ROBERT M. KIMMITT,
General Counsel.

By letter dated February 4, 1986, from Assistant Attorney General John Bolton to Strom Thurmond, Chairman of the Senate Judiciary Committee, the Justice Department recommended against enactment of S. 1655.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, February 4, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your request for the views of the Department of Justice on S. 1655, the "Unfair Foreign Competition Act of 1985." The bill would amend the Unfair Competition Act of 1916 and the Clayton Act to alter the standards upon which goods are found to have been unlawfully imported or sold in the United States under the 1916 Act, and to provide for further relief in the event of such a finding. The bill also creates a private right of action for certain violations of the customs laws. Former Assistant Attorney General William F. Baxter testified before your Committee on March 21, 1983, in opposition to enactment of two bills, S. 418 and S. 127, which were similar to sections 2 and 3 of S. 1655. The Department of Justice continues strongly to oppose enactment of this legislation.

I. BACKGROUND AND CURRENT LAW

The Unfair Competition Act of 1916 was the earliest U.S. law directed against the dumping of foreign products in the United States. It provides for criminal penalties and treble damage liability where articles are "commonly and systematically" imported at prices "substantially less" than their market value or wholesale price in their country of origin or in third countries, and where there is intent to destroy, injure, or prevent the establishment of, a U.S. industry, or to monopolize or restrain trade in this country.

The Antidumping Act of 1921 was the first administratively-enforced antidumping law, and was in effect, as amended, until supplanted by the Trade Agreements Act of 1979. The 1979 legislation retains the basic concepts of the 1921 statute, and while it is easier to establish actionable price differentials under the administrative antidumping law (now known as "Title VII") (19 U.S.C. § 1671 *et seq.*) than under the 1916 Act, the remedies are essentially limited to the prospective imposition of antidumping duties. Title VII allows the Commerce Department to investigate antidumping petitions by interested domestic persons whenever it is claimed that imported goods are sold in the U.S. either: (1) at a price that is less than the home market price, with adjustments for, among other things, shipping, differences in grade, and currency conversions; or (2) in circumstances where the U.S. price is the same or higher than the home market price, but the home market price does not reflect the full costs of production. In the latter instance, a "constructed" price is determined through examination of the exporter's costs, accounting methods; and the addition of hypothetical extras for "profit." Where exports from a non-market economy are involved, the Commerce Department chooses a "surrogate" country

that it deems similar in development to the "target" country and constructs a "fair" price based on prices or costs in the surrogate country.

Before administrative dumping determinations are made under Title VII, the International Trade Commission must find that there has been, or that there is a threat of, "material injury" to a domestic industry by reason of the alleged price discrimination. "Material injury" is defined principally as injury to employment, profits, output and ability to raise capital that "is not immaterial." It is not necessary to show predatory intent by the respondent exporters and importers.

The Trade Agreements Act of 1979 provided more effective and expeditious administrative procedures than had previously existed, including a strict time frame for determinations. As noted, if dumping is found to have occurred, the exclusive remedy is imposition on future imports of an antidumping duty equal to the margin of dumping, thereby neutralizing any unfairness to domestic competitors. If the Commerce Department determines that "critical circumstances" exist, antidumping duties may also be imposed retroactively on imports entered after a petition was filed, but for no more than 90 days before the publication of Commerce's preliminary determination.

Thus, under existing law domestic industries have an adequate administrative procedure to offset any injurious effects of imports sold at less than fair value. In addition, under the existing provisions of the 1916 Act, there is a further judicially-enforced remedy in those instances in which it can be shown that the dumping is predatory.

II. DESCRIPTION OF THE PROPOSED LEGISLATION

Section 3 of S. 1655 would amend the 1916 Act to permit awards of injunctive relief or treble damages¹ to any person injured by the importation or sale of foreign-produced articles at less than fair value, where that importation or sale causes or threatens material injury to a domestic industry or labor, or prevents the establishment or modernization of a domestic industry. Under the present Act, a defendant may be held liable only if it "commonly and systematically" imported or sold foreign articles at a price "substantially less" than fair value, and did so with the intent to destroy or injure a domestic industry or to restrain or monopolize any seg-

¹ Under section 3(B)(2), damages are recoverable for the injuries sustained where injunctive relief "cannot be timely provided or is otherwise inadequate. . . ." The bill appears to contemplate treble damage recovery, since section 2 would add the amended 1916 Act to the definition of antitrust laws in section 1 of the Clayton Act. Thus, it appears that section 4 of the Clayton Act, 15 U.S.C. § 15, which provides for treble damages for violations of the "antitrust laws," would permit the award of treble damages for persons injured by the importation of dumped products where the above situations are found to exist. In addition, section 3(B) of the bill provides that a person who may recover damages is one who is "injured in his business or property by reason of an importation or sale in violation of this section." Although the amount of allowable damages is not specified, injury to "business or property" is the injury for which treble damages are awarded under section 4 of the Clayton Act. Finally, on introducing S. 236, a prior version of S. 1655 this Congress, Senator Specter, the bill's chief sponsor, specifically referred to the ability of a U.S. industry to obtain "treble damages for harm actually inflicted by dumping practices" as furthering the policy of prohibiting "international price discrimination." 131 Cong. Rec. S. 480 (daily ed. Jan. 22, 1985). This, it is apparent that its chief sponsor intends that treble damages will be available under the bill. This proposed treble damage remedy does, of course, exacerbate the problems that damage awards would engender.

ment of U.S. trade. Thus, this provision of S. 1655 would eliminate the existing requirements of common and systematic sales at prices substantially less than fair value. In addition, it would impose treble damage liability without requiring a showing that the defendant acted with predatory intent or even that the defendant knew it was dumping. Section 3 of the bill also provides that a final dumping determination by the Department of Commerce or the International Trade Commission would constitute *prima facie* proof that the relevant criteria of the Act have been met.

III. DISCUSSION

The Department of Justice believes that this bill, if enacted, is likely to stifle legitimate import competition, to the detriment of consumers and domestic sellers, while failing to accomplish its stated objective of according more expeditious treatment to dumping complaints. We therefore strongly recommend against enactment of S. 1655.

The policies underlying the antidumping laws may be to some extent in tension with the policies that form the basis of our antitrust laws. The antitrust laws are intended to preserve competition and benefit consumers by encouraging firms to sell goods and services at the lowest profitable prices. Competition of the kind fostered by the antitrust laws benefits our industries as well as consumers. It encourages inefficient firms to become more efficient or to shift resources into areas in which they can compete more effectively.

The antidumping laws, however, are not intended to protect consumers or enhance competition, but to protect domestic industries from low-priced imports. If dumping is established, under present law no consideration is given to whether the benefits to U.S. consumers of low-priced imports may outweigh the harm to the affected industry.

In striking a balance between these competing policies, it should therefore be kept in mind that there are costs as well as benefits to our economy from expanding dumping remedies. It is essential to consider whether an expansion of the remedies for dumping will deter foreign firms from selling in this country and will therefore be more costly than beneficial to our economy. We believe that the proposed amendments to the 1916 Act will have this undesirable effect.

A. S. 1655 Could Have Significant Anticompetitive Effects

The expanded sanctions against dumping contemplated by section 3 of S. 1655 would impose costs on the importation of foreign products that may result in an unwarranted "chilling" of fair competition from foreign sources. The bill would allow injunctions against importation of goods and impose treble damage liability on foreign producers and exporters, and "related" importers, without requiring that they know that they are dumping. Under Title VII, the determination of whether a sale was made at less than fair value involves a very complicated procedure. For example, some sales but not others may be included in the averaging process to arrive at "foreign market value." Furthermore, Title VII requires that, in certain circumstances, third country sales be considered,

and in other circumstances, that a constructed value be calculated. It may be extremely difficult, and in some situations impossible, for a foreign manufacturer—not to mention an exporter or importer to calculate with any confidence the “foreign market value” of its products so that it can determine whether, in fact, it is violating the law. This element of unpredictability, coupled with the imposition of what may amount to substantial damages even when the manufacturers, exporters, and related importers did not know they were violating the law, can only act to heighten the “chilling effect” that this bill may have on legitimate import competition.

Indeed, the substantial potential liability contemplated by S. 1655 might well induce these firms to refrain altogether from selling imported products in the United States. And, if these firms do decide to sell imported goods in the U.S. market, they will shrink from vigorous price competition. Instead, they will price high enough to avoid the risk that their estimate of the lawfulness of a certain price may differ from the subsequent calculation of a court or competitor. The enactment of this bill would thus significantly reduce the positive impact of low- but lawfully-priced imports on domestic competition.²

To the extent that enactment of S. 1655 restricts the availability of imported goods or raises prices for such products, other U.S. industries could be affected adversely. It should be remembered that not all imported products are consumer goods. Billions of dollars of imports are used annually by U.S. firms as inputs in their manufacturing or other operations. Often, these businesses rely on low-priced imports to remain competitive with other U.S. firms as well as their foreign competitors.

From a practical viewpoint, it should also be observed that the private right of action contemplated by this bill may be a two-edged sword. Antidumping litigation in the federal courts, unlike administrative procedures, will afford not just plaintiffs but also defendants a range of litigation devices and strategies that could make any such litigation protracted, expensive, and risky. Defendants, as well as plaintiffs, are likely to make full use of the discovery methods available to them, not only with regard to the underlying dumping issues, but with regard to any counterclaim they might choose to assert. Indeed, faced with the possibility of injunctions and substantial damage judgments, defendants will have strong incentives to use all the litigation weapons at their disposal. Thus, S. 1655 could well harm the very U.S. businesses and workers that it is intended to protect.

² Moreover, it is not correct to say that the proposed amendments to the 1916 Act would simply extend the domestic price discrimination law to international transactions. See note 1 *supra*. The Robinson-Patman Act (15 U.S.C. §§ 13, 13a-c) should not be made applicable where one of the sales being compared takes place outside of the United States in view of the different economic and business contexts that would be involved. Furthermore, the Robinson-Patman Act does not involve “constructed value” or other complex price calculations called for in our anti-dumping laws and, unlike the antidumping laws, generally requires evidence of predatory intent in cases brought by a firm against its competitor. Finally, that Act also includes such important defenses as “cost justification” and “good faith meeting of competition,” each of which recognizes efficiencies in competitive responses to market conditions, but which have been adopted in antidumping law.

B. S. 1655 Is Unnecessary

S. 1655 is unnecessary because existing administrative antidumping procedures are fully adequate to protect domestic producers from injury resulting from dumped imports. The law provides a strict time frame for the Commerce Department and the International Trade Commission to determine whether unfair pricing has occurred. If dumping is found to have occurred, an antidumping duty is imposed equal to the margin of dumping, thereby neutralizing any unfairness to domestic competitors. If the Commerce Department determines that "critical circumstances" exist, antidumping duties may be imposed retroactively on imports entered up to 90 days before publication of Commerce's preliminary determination.

In those cases in which dumping practices are truly predatory, the Sherman Act, and in certain circumstances, the existing 1916 Act, condemn such practices and may subject the foreign party to criminal penalties, injunctive relief, and treble damages. Thus, the combination of adequate administrative procedures to protect against imports at less than fair value, and the existence of criminal and civil laws to protect against truly predatory practices, counsel strongly against new legislation creating an incentive to bring potentially anticompetitive law suits.

C. S. 1655 Would Violate International Obligations of the U.S. Government

Section 4 of S. 1655 expresses the "sense of the Congress" that the bill is consistent with and in accord with the General Agreement on Tariffs and Trade (GATT). We believe, however, that the antidumping remedies envisaged in S. 1655 are not consistent with our international obligations under Article VI of the GATT and the Antidumping Code. Article 16 of the Code states that "no specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement." Thus, any private remedy for dumping must also be consistent with the GATT. The Code permits a signatory to impose, in response to dumping, only antidumping duties limited to the margin of dumping. Retroactive duties are allowed only in special circumstances and for a very brief period during the pendency of the proceeding. While U.S. administrative antidumping remedies conform to these requirements, the provisions of S. 1655 for damages and injunctive relief appear to be inconsistent on their face with the GATT and the Antidumping Code.

To the extent that any provisions of the current 1916 Act are inconsistent with the GATT, they are protected by the "grandfather clause," paragraph 1(b) of the 1947 Protocol of Provisional Application of the GATT. Any amendment to the 1916 Act that is inconsistent with the GATT or the Code would not benefit from that protection, however, and accordingly, would contravene our international obligations.

Of equal if not greater importance is the negative reaction that these proposed changes would likely evoke from our trading partners, regardless of their legal status under the GATT. The United

States is a strong and aggressive exporter of goods to many countries, and U.S. firms have been found to be dumping in some of these countries. Enactment of S. 1655 could well lead to retaliation against our own exports, including the adopting of similar measures applicable to our exporting firms.

D. Provisions in S. 1655 Giving Prima Facie Effect to Administrative Determinations Lack Procedural Fairness

S. 1655 would also give *prima facie* effect to final determinations of the ITC or the Commerce Department on the issues of injury and margin of dumping, respectively, in actions brought under the bill. Such ITC and Commerce Department determinations, however, are an adequate basis on which to impose such an effect in view of the investigative, non-adversarial nature of dumping proceedings. Although interested parties are currently provided a range of participatory rights, they are not afforded the full range of rights available in adjudicative proceedings conducted under the Administrative Procedure Act or the Federal Rules of Civil Procedure, the most basic of which include discovery and cross-examination. Thus, the use of final determinations by the Commerce Department and the ITC as *prima facie* proof of violation of the proposed law would be highly unfair and lacks the procedural safeguards contained in the evidentiary rules applicable to other kinds of civil actions in the federal courts.

E. S. 1655 Is Unlikely to Lead to Faster Resolution of Disputes

It has been suggested that judicial adjudication of dumping claims as contemplated by S. 1655 would produce faster results than do current administrative procedures. We have strong doubts about this proposition. Complex issues of dumping margin, industry injury, and injury to the plaintiff are unlikely to be amenable to quick resolution in the federal courts. Pretrial procedures would usually encompass substantial discovery, including sensitive cost and marketing information. In addition, proof of damages, which is not part of the current administrative procedure, would involve complicated econometric analyses, the use of outside experts, and considerable cross-examination. Thus, it is unlikely that antidumping cases could be adjudicated in the courts within the approximately one year maximum period for administrative decisions required by statute.

Moreover, while S. 1655 holds out hope for unusually fast "relief" by way of temporary restraining orders, preliminary injunctions, or import exclusion orders, it does not contain any specific standards for the issuance of such orders, but merely leaves them to the court's discretion. Were a court to apply this discretion according to accepted standards for preliminary relief, it would grant the relief only upon plaintiff's showing a likelihood of success on the merits and a likelihood of irreparable harm. In situations where the Commerce Department has made an affirmative preliminary finding of dumping, the concomitant suspension of liquidation and the bonding requirement on subsequent imports are likely to obviate any future harm to the domestic industry from the dumping practices and thus any basis for preliminary relief from the court.

F. Private Enforcement of Customs Fraud Is Objectionable

Section 5 of S. 1655 would create a private cause of action for any person injured by a violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. § 1592(a)). Section 592(a) prohibits persons from entering or attempting to enter imported merchandise into the United States by means of documents or statements that contain material and false information, or material omissions, where such acts are the result of fraud, gross negligence or negligence. Violations of this section may subject the alleged violator to civil penalties as provided by statute in actions initiated by the government.³ S. 1655, however, would allow "interested parties" as defined in the bill who are injured by such actions to sue the alleged violator for injunctive relief, costs of suit and, in certain circumstances, damages.

The Department also opposes this provision of the bill. First, this provision provides another basis for private actions by parties seeking to bar importation of competing imports without any required showing of knowledge or intent to violate the customs laws, and thus, is subject to abuse for anticompetitive motives. Moreover, we are concerned that by increasing the potential liability of exporters and importers who may unintentionally make a mistake on import documentation, this provision will unnecessarily increase the costs of imported goods to U.S. consumers. There are also serious questions as to the consistency of this provision with Article VIII of the GATT. Paragraph 3 of that Article prohibits contracting parties from imposing substantial penalties for minor breaches of customs regulations or procedural requirements, particularly where penalties for omissions or mistakes in customs documentation that are easily rectifiable and made without fraudulent intent or gross negligence are greater than necessary to serve merely as a warning. The imposition of private damage liability in addition to the civil penalties already provided for in section 592(a) might be viewed as contravening this provision of the GATT, especially if the violation of section 592(a) was based on mere negligence.

Finally, section 592(a) is not intended to benefit particular individuals. Rather, like many provisions of federal law, it is intended to ensure the integrity of government programs by establishing general standards of conduct that are to be policed—in this case through civil sanctions—by the government. In fact, the penalties that may be assessed under section 592 are intended in part to compensate the United States for customs duties it has not received due to false and fraudulent misstatements of importers. U.S. competitors are only indirectly and marginally affected by this law.

Private enforcement of statutes expressly designed to benefit the United States should be the exception and not the rule. There has been no showing that the United States has not adequately enforced section 592(a); to the contrary, the government has initiated nearly every action referred to it by the Customs Service. Hence we believe that there is no legitimate purpose to be served in permitting private enforcement of section 592(a).

³ 15 U.S.C. §§ 1592(c), (e); 1604.

CONCLUSION

For all of the above reasons, the Department of Justice strongly recommends against enactment of S. 1655.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

By letter dated October 18, 1985, from Terry Calvani, Acting Chairman of the Federal Trade Commission, to Strom Thurmond, Chairman of the Senate Judiciary Committee, the FTC recommended against enactment of S. 1655.

FEDERAL TRADE COMMISSION,
Washington, DC, October 18, 1985.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of September 26, 1985, requesting the views of the Federal Trade Commission concerning S. 1655, the "Unfair Foreign Competition Act of 1985." Like S. 236, proposed previously in this session, S. 1655 would amend both the Antidumping Act of 1916 and the Clayton Act. According to Senator Specter, sponsor of the bill, S. 1655 modifies S. 236 in the areas of venue, standing, and preferred remedies.¹ S. 1655 is apparently intended, like S. 236, to create additional disincentives to dumping and foreign subsidies.² The Commission opposes enactment of S. 1655.

By letter of June 17, 1985 (copy attached), the Commission expressed its views regarding S. 236. The Commission opposed passage of S. 236 because it could injure consumers by encouraging the formation of cartels between domestic producers and importers, by denying consumers the benefits of fairly traded imports, by discouraging competitive behavior by importers, and by causing confusion in the enforcement of the Clayton Act and the antidumping and countervailing duty laws. As discussed more fully in our June 17, 1985 letter, S. 236 could create these adverse effects through provisions, *inter alia*, that would grant a final determination under Title VII of the Tariff Act of 1930 *prima facie* status in a private antidumping suit for treble damages, expose domestic firms "related" to foreign sellers to the risk of treble damage actions, expand judicial discovery sanction powers to include injunctions against further imports, and impose treble damage liability without reference to competitive effects or purpose. In addition, the bill is inconsistent with Clayton Act provisions regarding standing, venue, tolling, and injunctive relief. Furthermore, it includes subsidies in the calculation of the foreign value of allegedly dumped goods without ref-

¹ See comments by Senator Specter, 131 Cong. Rec. S11646-48 (daily ed. September 18, 1985). S. 1655 also creates a private right of action for customs fraud. The Commission expresses no views regarding the customs fraud provisions.

² *Id.* at S11646-47.

erence to any subsidy determination or final action under Title VII. It therefore creates the potential for inconsistent enforcement of the antitrust and trade laws.

The Commission has carefully reviewed the provisions of the current bill, S. 1655, and found that the only significant changes in the new bill are the new section on customs fraud and the inclusion of the Court of International Trade as a forum for bringing private antidumping suits. Consequently, the Commission concludes that the objections previously expressed in relation to S. 236 apply equally to S. 1655. The added language in S. 1655 permits private antidumping suits to be brought in the Court of International Trade as well as in the district court of the District of Columbia. However, it does not resolve the Commission's concerns regarding the potential for confusion in the application of the Clayton Act and the antidumping and countervailing duty laws. In fact, it may increase this potential. Because the Court of International Trade does not have jurisdiction over traditional claims, it is possible that a single set of facts giving rise to allegations of both dumping and violations of the Sherman or Clayton Acts could be heard by two different courts and lead to inconsistent results.

Accordingly, while the Commission understands the desire of the sponsors of S. 1655 to ensure "vigorous enforcement" of trade laws by "nonprotectionist means,"³ for the reasons summarized above, the Commission opposes those provisions of S. 1655 that would amend the Antidumping Act of 1916 or the Clayton Act.

By direction of the Commission:

TERRY CALVANI,
Acting Chairman.

FEDERAL TRADE COMMISSION,
Washington, DC, June 17, 1985.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHARIMAN: Thank you for your letter of April 22, 1985, requesting the views of the Federal Trade Commission concerning S. 236, which would amend both the Antidumping Act of 1916 and the Clayton Act and, in our view, would also have the effect of amending the Federal Rules of Civil Procedure. The stated purpose of S. 236 is to create additional disincentives to dumping.¹ S. 236 may, however, encourage the formation of cartels, stimulate other anticompetitive acts harmful to the United States consumer, and produce confusion in the application of the Clayton Act as well as in the operation of the antidumping and countervailing duty laws of Title VII of the Tariff Act of 1930, *as amended*. The Commission, therefore, opposes S. 236.

³ *Id.* at S11646.

¹ See comments by Senator Specter, 131 Cong. Rec. 476-480 (daily ed. January 22, 1985).

I. S. 236 may injure consumers by denying them the benefits of fairly traded imports and by encouraging the formation of cartels

S. 236 would amend the Antidumping Act of 1916,² 15 U.S.C. § 72, in three principal ways for the purpose of making it easier for plaintiffs to prevail in private civil litigation. These changes could also have the unintended effects of restricting fairly traded imports and fostering cartels between United States firms and foreign companies. First S. 236 would eliminate the current provisions in the Antidumping Act of 1916 which establish liability provided that the dumping³ is done "commonly and systematically," is "substantial," and is "done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" (emphasis added). 15 U.S.C. § 72. Second, S. 236 would provide that a final determination by the Department of Commerce ("Department") and the International Trade Commission ("ITC") that there has been "dumping" in violation of Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673 *et seq.*, is *prima facie* evidence of a violation of the Antidumping Act of 1916. Third, S. 236 would permit the District Court to enjoin the further importation of any allegedly dumped items by the defendant if the defendant fails to comply with discovery orders. These three changes will make a final determination by the Department and the ITC under Title VII a powerful sword in the hands of private plaintiffs and will, therefore, encourage additional antidumping petitions and the settlement of antidumping petitions brought, or threatened to be brought, under Title VII⁴—regardless of their possible merit.

Congress, through the antidumping and countervailing duty laws, not only wished to exclude "unfair" competition in the United States, but also wished to assure that Americans realize the benefits of "fair" competition. Thus, if foreign firms are selling their products in the United States at a low price, not because of dumping, but rather because they are more efficient, then consumers are entitled to the benefits that they derive from the imported products. The effect of providing such additional power to private plaintiffs may be the withdrawal from the United States market of many fairly traded imports by firms leery of the risks and costs of litigation spawned by S. 236. The result will be higher prices both

² S. 236 calls Section 801 of the Act of September 8, 1916, both the "Unfair Competition Act of 1916" and "An Act to raise revenue, and for other purposes." Courts generally refer to it as the Antidumping Act of 1916. See *Zenith Radio Corp. v. Matsushita Electric Industries Co., Ltd.*, 723 F.2d 319, 322 (3d Cir. 1983).

³ "Dumping is 'price discrimination between purchasers in different national markets.'" *Zenith Radio Corp. v. Matsushita Electric Industries Co.*, 723 F.2d 319, 322 (3d Cir. 1983) quoting J. Viner, *Dumping: A Problem In International Trade* 4 (1923, reprinted in 1966). Under the Antidumping Act of 1916 dumping is the difference between the price in the United States and the price in foreign countries. 15 U.S.C. § 72. Under Title VII the dumping margin is the difference between the United States price and the foreign market value, with the foreign market value being either the price in the foreign country or the "constructed value." 19 U.S.C. § 1673, as defined by 19 U.S.C. §§ 1677a and 1677b. Constructed value is the cost of materials and fabrication or other processing plus at least 10 percent for "general expenses" and at least 8 percent for "profit." 19 U.S.C. § 1677b(e)(1). S. 236 adopts the Title VII definition.

⁴ The possible use of a final judgment in a government antitrust action as *prima facie* evidence in a private antitrust action encourages the settlement of government antitrust actions, since a consent order cannot be so used.

for the imports that remain and for the competing domestic products, thereby imposing large costs on the United States economy and the United States consumer.⁵

Moreover, Congress has observed that settlements of Title VII dumping petitions may not be in the public interest and may lead to cartels. Section 604 of Title VI of the Trade and Tariff Act of 1984 amended the procedures, 19 U.S.C. § 1673c, by which a Title VII dumping investigation may be terminated or suspended. This amendment reflects a Congressional "concern that the countervailing duty and antidumping laws can be used by domestic industries and foreign governments to obtain cartel or orderly marketing arrangements that may be contrary to the public interest . . ." H.R. Rep. 98-752, 98th Cong., 2d Sess. (1984) at 18. Congress indicated that "In most cases the [antidumping] investigation should be completed [by the Department and the ITC] and duties imposed rather than permitting the foreign country to continue unfair trade practices and using these laws to guarantee either the domestic industry of [sic] foreign producers a share of the U.S. market." *Id.* at 19. S. 236 will, however, have the effect of encouraging foreign firms accused of dumping under Title VII to settle rather than run the risk of having a final adverse determination by the Department and the ITC which could then be used as *prima facie* evidence in a private treble damage action⁶ against them or the United States firms who import their products.

The use in S. 236 of a final determination by the Department and the ITC as *prima facie* evidence in a private action lacks the safeguards built into the Clayton Act's use of "a final judgment or decree" as *prima facie* evidence in a private antitrust action.⁷ 15 U.S.C. § 16(a). In an antitrust action brought by the Department of Justice, final judgment is rendered only after the District Court has followed the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The Federal Trade Commission's proceedings⁸ are subject to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the Commission adheres to procedures and evidentiary rules substantial analogous to those governing District Court adjudications.⁹ However, Title VII proceedings before the Department

⁵See, for example, David G. Tarr and Morris E. Morkre, *Aggregate Costs to the United States of Tariffs and Quotas on Imports: General Tariff Cuts and Removal of Quotas on Automobiles, Steel, Sugar, and Textiles* (Bureau of Economics Report to the FTC, USGPO, 1984).

⁶The Antidumping Act of 1916 provides for treble damages. Section 2 of S. 236, by virtue of its making the Antidumping Act of 1916 an "antitrust law" within the meaning of Section 1 of the Clayton Act, apparently retains this treble damage provision.

⁷We note that the Title VII findings of the Department and the ITC are admissible in private litigation under Rule 803(8)(C) of the Federal Rules of Evidence (the hearsay exception dealing with government investigations) *Zenith Radio Corp. v. Masushita Electrical Industries Co.*, 723 F.2d 238, 266-271 (3d Cir. 1983), *cert. granted on other issues*, 105 S. Ct. 18f3 (1985).

⁸In initiating and prosecuting antitrust actions under Section 5 of the FTC Act the Commission is obligated to act in the public interest, 15 U.S.C. § 45(b), and the Clayton Act accords *prima facie* evidentiary status only to final judgments rendered in government, as opposed to private, antitrust suits. In contrast, Title VII permits private parties to initiate actions and act to some extent as the prosecutor of their substantive claims. Title VII also does not explicitly require the Department or the ITC to consider the public interest when making their determination of whether to impose dumping tariffs.

⁹It is unclear whether final orders of the Federal Trade Commission are given *prima facie* effect under Section 5(a) of the Clayton Act. The Supreme Court has explicitly not stated an opinion on this question, *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-18 (1965), and the lower courts are divided. Compare *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 66-76 (1st Cir. 1970) (Commission order

and the ITC are specifically not governed by the Administrative Procedure Act,¹⁰ 19 U.S.C. § 1677c(b), and neither agency accords parties in these proceedings the protection of, or even follows, rules resembling the Federal Rules of Evidence or the Federal Rules of Civil Procedure.¹¹

In sum, S. 236 would provide a powerful incentive for United States firms to bring, or threaten to bring, Title VII petitions in order to force a settlement with foreign rivals that could create a cartel. The effects of these settlements may be the withdrawal from the United States of fairly traded imports, higher prices for United States consumers, and large costs to the economy.

II. S. 236 may injure consumers by putting a "cloud" over imports

Section 801(a)(1)(C) of S. 236 gives a private cause of action against "any importer of such [dumped] article into the United States who is related to such manufacturer or exporter." S. 236 does not define "related," and the term could be construed to include a mere "buyer-seller" relationship. The threat of a treble damage action could discourage United States firms from importing foreign products, especially if United States rivals suggest, privately or publicly, that the foreign goods are being "dumped." Moreover, by proscribing even occasional sales at "dumped" prices, S. 236 may discourage firms from selling foreign goods in the United States, since these firms may not know the precise average price in the foreign market when they are setting the price in the United States. The imposition of such a "cloud" over our imports could well reduce competition and hurt United States consumers.

III. S. 236 may injure consumers by enjoining imports if defendants do not comply with discovery orders

Section 801(f) of S. 236 provides that the District Court of the District of Columbia may enjoin the defendant from further importation of the allegedly dumped articles if the defendant fails to comply with a discovery order. Admittedly, discovery from foreigners raises difficult problems in any court proceedings. However, none of the sanctions for failure to comply with discovery orders presently enumerated in Rule 37 of the Federal Rules of Civil Procedure specifically provides for the enjoining of the importation of

under Section 2(a) of the Clayton Act is *prima facie* evidence) and *Purex Corp. Ltd. v. Proctor & Gamble Co.*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972) (Commission order under Section 7 of the Clayton Act is *prima facie* evidence) with *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 322-23 (S.D.N.Y. 1971) (Commission order under Section 5 of the FTC Act is not *prima facie* evidence). In amending Section 5(a) of the Clayton Act in 1980 to provide that findings of the Commission are not to be given collateral estoppel effect, Congress left open the question of which Commission orders, if any, are *prima facie* evidence. Congress said "While the amended bill precludes application of collateral estoppel to certain types of agency findings in a subsequent proceeding under the antitrust laws, any agency findings qualified for section 5(a) [of the Clayton Act] treatment will continue to be eligible for *prima facie* effect." H.R. Rep. 96-874, 96th Cong., 2d Sess. (1980) at 7, reprinted in 1980 *U.S. Code Congressional and Administrative News* at 2757.

¹⁰ For example, the ITC and the Department are required merely to maintain a record of any *ex parte* meetings with interested parties or other persons. 19 U.S.C. § 1677f(a)(3). The Federal Trade Commission's rules prohibit any *ex parte* meeting between either a Commissioner or Administrative Law Judge, on the one hand, and either an employee of the Commission or a non-employee on the other hand. 16 C.F.R. § 4.7.

¹¹ These proceedings do, of course, provide for notice, hearings, and judicial review. However, the Department of Commerce does not permit cross-examination of witnesses under oath. 19 C.F.R. § 353.47.

foreign goods. S. 236 could, therefore, be construed as expanding the discovery sanction powers of a court in the case of antidumping suits. Our experience in obtaining evidence from foreigners, as part of our antitrust investigations, reveals that in some instances foreigners are prohibited by their own laws from complying with requests for evidence. Thus, under S. 236, a United States plaintiff might be able to achieve a halt in the importation of goods—which, of course, could lead to an increase in the price paid by United States consumers—merely by filing an antidumping suit and making a discovery request on a foreign defendant who is prohibited by foreign law from complying with the request, without regard to whether the goods are in fact being dumped.¹²

IV. S. 236 could discourage behavior that promotes competition

As Assistant Attorney General for Antitrust William Baxter said, when testifying in opposition to an earlier version of 236, "The policies underlying the antidumping laws may be to some extent at odds with the policies that form the basis of our antitrust laws." *The Unfair Competition Act of 1983: Hearings on S. 127 and S. 418 Before the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. (1983) at 24. While the antitrust laws are designed to protect competition, the dumping laws are intended to protect domestic industries from low-priced imports.

Treble damages under the antitrust laws have traditionally been reserved for acts which have the purpose or effect of adversely affecting competition and which are, therefore, deemed to be particularly pernicious to a free market society. As discussed above, the Antidumping Act of 1916 predicates liability only on "commonly and systematically" importing goods at prices "substantially" lower than the foreign market value, when done with the "intent" of injuring the domestic industry. 15 U.S.C. § 72.

However, S. 236, while retaining the treble damage remedy of the Antidumping Act of 1916, permits an action to be brought based on a single sale involving even a very slight price differential, without regard to the seller's intent. S. 236 essentially adopts the standards of Title VII—importation at less than fair value which threatens or causes material injury to "an industry in the United States"—as the basis for awarding treble antitrust damages. Consequently, S. 236 would permit recovery of treble damages in instances involving procompetitive behavior on the part of an importer who, for example, engages in occasional sales at less than the foreign price in order to meet competition from United States rivals.

¹² Under Section 801(a)(2)(A) of S. 236, a successful plaintiff may recover damages and obtain "such equitable relief as may be appropriate." It is not clear whether such equitable relief would include a total ban on the imports at issue. Consequently, a plaintiff may be able to achieve greater prospective relief against dumped imports pursuant to the discovery sanction provisions of S. 236 than could be obtained were the plaintiff to prevail on the merits. This potential discrepancy could invite abuse in the form of non-meritorious, or marginally meritorious, actions in which the initiation of court proceedings and discovery is more important to the plaintiff than recovery on the merits.

V. S. 236 may cause confusion in the enforcement of the Clayton Act and other statutes

1. Confusion with provisions of the Clayton Act

Section 2 of S. 236 amends Section 1 of the Clayton Act, 15 U.S.C. § 12, so that the Antidumping Act of 1916 is deemed an antitrust law. This amendment may yield confusion in the enforcement of the Clayton Act in the areas of standing, venue, tolling of the statute of limitations, and injunctive relief, especially when the same activities are alleged to constitute dumping as well as violations of the Sherman or Clayton Acts. *See, e.g., Zenith Radio Corp. v. Matsushita Electric Industries Co.*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S. Ct. 1863 (1985) (complaint alleging violations of the Antidumping Act of 1916, the Clayton Act, the Sherman Act, and the Wilson Tariff Act).

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue in District Court. Section 801(a)(1)(C) of S. 236 provides "any person [who] is injured in his business or property by reason of such importation or sale [of dumped articles]" may sue. It is not clear which of these two standards for standing a plaintiff would have to satisfy.

Section 4 of the Clayton Act also provides, in pertinent part, that suit may be brought "in any district court of the United States in the district in which the defendant resides or is found or has an agent." *See also* Section 12 of the Clayton Act, 15 U.S.C. § 22. Section 801(a)(1)(C) of S. 236 provides that a suit may be brought in "the district court of the District of Columbia." It is not clear which of these two venue standards would be applicable.

Although both the Clayton Act and S. 236 specify a four-year statute of limitations for private suits (15 U.S.C. § 15b and proposed Section 801(e)(1)), the provisions for tolling of the four-year period differ. Under the Clayton Act, a private cause of action "based in whole or in part" on the same "matter" involved in a United States civil or criminal antitrust proceeding (excluding actions for damages) is tolled during the pendency of the government proceeding and for one year thereafter. 15 U.S.C. § 16(b). Under Section 801(e)(2) of S. 236, the statute of limitations would be tolled during the pendency of any Title VII antidumping proceeding relating to "the importation in question" plus one year thereafter. It is not clear which tolling provisions would govern, particularly in situations where the activities of the defendant were alleged to constitute dumping as well as violations of the Clayton Act or Sherman Act. A plaintiff might claim that its antidumping action was tolled because of the pendency of a government antitrust action even though either no antidumping proceeding under Title VII had been brought or the Title VII proceeding had been finally determined several years previously.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part, that a private party may obtain injunctive relief "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is grant-

ed by courts of equity, . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate. . . ." As discussed above, Section 801(f) of S. 236 provides that the District Court may enjoin the defendant's importation of the allegedly dumped articles if the defendant fails to comply with any discovery order. Section 801(a)(2)(a) of S. 236 provides that the District Court may grant "such equitable relief as may be appropriate." The injunction standards of S. 236 go well beyond the injunction standard of the Clayton Act and also fail to protect defendants against "an injunction improvidently granted." It is not clear which injunction standard would be applicable in a private dumping action.

2. Confusion with other statutory provisions

Two other aspects of S. 236 could create confusion in the courts' handling of private actions that allege violations both of the dumping law and of other statutes. Section 801(g)(2) of S. 236 states that the court may examine confidential or privileged material *in camera*, but it omits any reference to the standards set forth in Rule 26(c) of the Federal Rules of Civil Procedure applicable generally to federal court litigation. Section 801(h) of S. 236 directs that private dumping suits be expedited but specifies no basis for determining priorities among other matters that are statutorily directed to be expedited, such as proceedings subject to the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)(5) and 2000e-6(b), or merger enforcement proceedings under the Clayton Act, 15 U.S.C. § 18a(f)(B).

VI. S. 236 may produce confusion in the operation of the countervailing duty and antidumping provisions of Title VII

The potential for confusion in the operation of the countervailing duty and antidumping laws of Title VII arises from Section 801(i)(2) of S. 236, which specifies that "foreign market value" and "constructed value" are to be increased by the amount of any foreign "subsidy."¹³ S. 236's provision for inclusion of foreign subsidies, as determined by the District Court, is without reference to any countervailing duty proceeding, or subsidy determination, by the Department. S. 236 would, therefore, create a serious potential for inconsistent determinations regarding the existence of amount of any subsidy by the Department and the Court of International Trade (which reviews the Department's decision), on the one hand, and by the District Court for the District of Columbia on the other hand. This possible inconsistency is of particular concern given the com-

¹³ Under both S. 236 and Title VII the dumping margin is the difference between the United States price and the foreign market value, with the foreign market value being either the price in the foreign country or the constructed value. Section 801(a)(1)(A) of S. 236; 19 U.S.C. § 1673, as defined by 19 U.S.C. §§ 1677a and 1677b. Under Title VII the United States price is increased by the amount of the export subsidy. 19 U.S.C. § 1677a(d)(1)(D). Suppose, for example, that the United States price is \$11, the foreign market value (excluding any subsidy) is \$20, and there is a \$3 export subsidy. Under Title VII, the dumping margin would be \$6 (\$20-\$14) and the countervailing duty would be \$3. Under S. 236, the foreign market value would be increased by the amount of the subsidy to \$23, resulting in a dumping margin of \$9 (\$23-\$14).

plexity of subsidy determinations under the countervailing duty law.¹⁴

Conclusion

For the reasons stated above, the Commission concludes that enactment of S. 236 would have serious adverse consequences for United States consumers, for competition, for enforcement of the Clayton Act, and for administration of the antidumping and countervailing duty laws. The Commission, therefore, opposes S. 236,

By direction of the Commission.

JAMES C. MILLER III,
Chairman.

By letter dated December 11, 1985, from Douglas Riggs, General Counsel of the U.S. Department of Commerce to Strom Thurmond, Chairman of the Senate Committee on the Judiciary, the Commerce Department recommended against enactment of S. 1655.

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, DC, December 11, 1985.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for providing the Department of Commerce with the opportunity to comment on S. 1655, a bill which in part is intended to simplify the standards for obtaining relief under the Antidumping Act of 1916 by firms injured by imports "dumped" into the domestic market. The Department believes that S. 1655 includes provisions which are not consistent with the international obligations of the United States and, if enacted, would lead to retaliation against U.S. exports. Accordingly, we strongly oppose its enactment.

The Antidumping Act of 1916 (15 U.S.C. § 72) (the "1916 Act") creates a cause of action for any person injured in his business or property by reason of the sale or importation of foreign articles when (1) those articles are sold in the United States at a price substantially less than their actual market value or wholesale price in the principal market of the country of their production or other foreign countries to which they are commonly exported; and (2) those articles are imported or sold at such price with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States (i.e., the articles are sold with "predatory intent"). The 1916 Act provides for award of treble damages and costs to firms injured by violations of its provisions, as well as for criminal penalties against the violators.

S. 1655 amends the 1916 Act in two major ways. First, it substantially lowers the standard for determining violations of the 1916

¹⁴ We also note that it is not clear how the *prima facie* status that S. 236. accords to a Title VII antidumping determination would apply to any subsidy alleged as part of the dumping margin under S. 236, particularly since S.236 makes no reference to the existence of outcome of any Title VII countervailing duty proceeding involving the same product.

Act. Currently, the 1916 Act basically requires the district court to find that imports are *commonly and systematically* sold at a price *substantially* less than their actual market value *with a predatory intent* to harm or destroy a U.S. industry. The bill eliminates the predatory intent requirement and would impose liability if the foreign articles are sold in the United States at a price that is less than their foreign market value and are causing or threatening material injury to industry or labor or prevents, in whole or in part, the establishment or modernization of any industry. S. 1655 also expands the type of relief available under the 1916 Act to include in addition to monetary damages, equitable relief such as an injunction to ban further importation of the articles into the United States.

The Department opposes S. 1655 for several reasons.

First, we believe that the bill is inconsistent with our international obligations under the General Agreement on Tariff and Trade ("GATT") and the GATT Antidumping Code. Dumping is subject to internationally agreed upon rules set forth in the 1979 Antidumping Code, which was approved by Congress in the Trade Agreements Act of 1979. Articles 1 and 16 of the Code state explicitly that actions against dumping are to be taken only in accordance with Code provisions. Although the Antidumping Act of 1916 is inconsistent with some of the provisions of GATT, it predated the GATT and may continue in effect in accordance with the 1947 Protocol of Provisional Applications of the GATT (the "grandfather clause"). However, the Protocol does not protect post-1947 amendments, so it would be inconsistent with our international obligations to enact amendments to the 1916 Act that are in conflict with the GATT or the Code. A number of such conflicts appear in S. 1655:

1. The amendment set out as paragraph 801(C)(1) providing for equitable relief in the form of a ban on imports conflicts with the requirements of the Code regarding permissible remedies to counter dumping practices. The Code does not authorize the use of a ban on imports as a remedy for dumping, except in limited circumstances in connection with a voluntary agreement to cease exports under Article 7.

2. Both the GATT and the Code provide that the remedy for dumping is the assessment of antidumping duties and that such duties must not exceed the margin of dumping; thus the recovery of any damages, and certainly the recovery of treble damages, under paragraph 801(C)(2) as revised, would be in conflict with the GATT and Code provisions for non-excessive assessment of antidumping duties.

3. The provision of the bill adding a new paragraph 801(H) to permit imposition of an import ban to compel discovery conflicts with Article 10 of the Code, which prohibits the imposition of provisional measures before a preliminary affirmative determination of dumping (except in "critical circumstances", where 90 days retroactivity is permitted), and with Article 5 of the Code, which provides that customs clearance procedures may not be hindered by antidumping investigations.

4. The provisions of the bill are generally inconsistent with GATT and Code requirements concerning findings of injury, cus-

toms clearance procedures, and various procedural rights. There is little question that enactment of such provisions would expose exporters in many of our industries to internationally authorized retaliations from our trading partners, and have a potentially severe impact on U.S. firms and workers.

Second, we believe that the penalties imposed by S. 1655 may not be commensurate with the degree of culpability required. Under the bill, an importer would become liable under the 1916 Act if it simply imported an article which is priced at less than foreign market value and such importation caused or threatened material injury to U.S. industry or labor. The requirement that dumping be done with the specific intent to injure or destroy a U.S. industry is eliminated. Based on the Department's experience in administering Title VII of the Tariff Act of 1930, it is often extremely difficult for a foreign manufacturer or a U.S. importer to know in advance whether it is dealing in dumped goods. The manufacturer may be unable to predict the method which the Department will use to determine foreign market value or whether the Department will adjust wholesale prices to account for differences in circumstances of sale or differences in the merchandise. U.S. importers often have no knowledge of the prices charged or costs incurred overseas by their foreign suppliers. Moreover, dumping margins can be radically affected by currency fluctuations over which foreign manufacturers and U.S. importers have no control. Thus a manufacturer or importer may import or sell articles in the U.S. at a certain price without knowing that that price is less than the foreign market value. Therefore, the harsh sanctions of S. 1655, which include a ban on imports which could deprive an unwitting importer of the means to remain in business, appear inappropriate.

Third, we believe that an attempt to provide a judicial substitute for Title VII is misguided. Despite occasional complaints that Title VII investigations take too long, it is our view that the Department and the U.S. International Trade Commission can handle these cases much more expeditiously than could the courts. We believe that as a result of the Trade Agreements Act of 1979 and the trade reorganization, Title VII has been effective in combatting dumping and that it should remain the primary vehicle for dealing with this unfair trade practice.

Sincerely,

DOUGLAS A. RIGGS.

VII. REGULATORY IMPACT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the Act will have no direct regulatory impact.

VIII. COST ESTIMATE

In accordance with paragraph 11(a), Rule XXVI, of the Standing Rules of the Senate, the Committee offers the Report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 25, 1986.

HON. STROM THURMOND,
*Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate
Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1655, the Unfair Foreign Competition Act of 1985, as ordered reported by the Senate Committee on the Judiciary, March 20, 1986. This bill would involve some costs for the U.S. government, primarily in the courts, but we have no basis for estimating the amount of such costs. S. 1655 would result in no costs to state or local governments.

S. 1655 amends the Unfair Competition Act of 1916 to alter the standards for determining whether goods have been unlawfully imported or sold within the United States. Section 801 of the current statute prohibits the sale or import of articles within the United States at prices substantially less than market value or wholesale price in the country of origin or in third countries, when there is intent to injure an industry in the United States, or to monopolize or restrain trade. In addition to criminal penalties for violations, injured persons may sue in District Court for treble damages and costs. S. 1655 would amend that provision to prohibit sale or import of articles at prices less than foreign market value or constructed value, permit a remedy for injured parties without the requirement of intent on the part of the defendant, and provide for an injunction against further imports, as well as damages when injunctive relief is inadequate. Under the amended, statute, civil actions could be brought in the District Court of the District of Columbia or the Court of International Trade and would be expedited in every way possible. This bill also provides for private enforcement actions and similar remedies for parties injured by violations of sections 592(a) of the Tariff Act of 1930, concerning customs fraud.

By broadening the conditions required to establish injury, the amendments to the Unfair Competition Act may encourage more suits on behalf of individuals, and therefore result in additional costs for the courts. Because the Administrative Office of the U.S. Courts does not maintain data on the number or cost of suits brought under the existing statute, and because of the uncertainty surrounding the number of potential cases and the extent of litigation, we cannot predict this budgetary effect.

Title VII of the Trade Agreements Act of 1979 currently provides for administrative determinations by the Department of Commerce and the International Trade Commission as to whether foreign merchandise is being sold in the United States at less than its fair value, and whether U.S. industries are materially injured or threatened with injury as a result of these imports. The remedy provided by Title VII is the imposition of antidumping duties. S. 1655 provides that adverse determinations by these agencies would constitute *prima facie* proof of violations of that act. This could have an impact on the workload of those agencies by affecting the number of determinations requested and the likelihood that parties

will reach a settlement prior to a final determination, but we cannot estimate this impact with any accuracy.

The U.S. Customs Service is currently responsible for enforcement of the customs fraud statute. The Attorney General is to institute proceedings in the U.S. District Court or the Court of International Trade, when appropriate, for recovery of fines, penalties or forfeitures stemming from customs violations. S. 1655 would establish a private right of action alongside existing enforcement mechanisms and give the United States the right to intervene in any such suit. This provision also could result in additional costs for the courts to the extent that additional actions are brought by private parties, but we cannot estimate the precise impact. The Customs Service would probably be called upon to provide documentation as part of the discovery process in these cases, and therefore may have some additional burden, but because of the uncertainty about the number of additional actions, it is unable to estimate the additional workload, if any, this change might require.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

IX. CHANGES IN THE EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1655, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 15—COMMERCE AND TRADE

§ 12. Words defined; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; *section 801 of the Act of September 8, 1918, entitled "An Act to raise revenue, and for other purposes" (39 Stat. 798; 15 U.S.C. 72); and also this Act.*

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State,

Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word person or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

(Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730; Sept. 30, 1976, Pub. L. 94-435, title III, § 305(b), 90 Stat. 1397.)

Subchapter VI—Prevention of Unfair Methods of Competition

§ 71. Definition

When used in this subchapter the term "person" includes partnerships, corporations, and association.
(Sept. 8, 1916, ch. 463, § 800, 39 Stat. 798.)

§ 72. Importation or sale of articles at less than market value or wholesale price

[It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

[Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

[Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

【The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.】

(A) No person shall import or sell within the United States any article manufactured or produced in a foreign country if:

(1) such article is imported or sold within the United States at a United States price which is less than the foreign market value or constructed value of such article; and

(2) such importation or sale—

(i) causes or threatens material injury to industry or labor in the United States, or

(ii) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

(B) Any interested party who shall be injured in his business or property by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against any manufacturer or exporter of such article or any importer of such article into the United States who is related to such manufacturer or exporter.

(C) In any action brought under subsection (B), upon a finding of liability on the part of the defendant, the plaintiff shall—

(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question; or

(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

(3) recover the costs of the action, including reasonable attorney's fees.

(D) The standard of proof in any action filed under this section is a preponderance of the evidence. Upon a prima facie showing of the elements set forth in subsection (A), or upon a final determination adverse to the defendant by the Department of Commerce or the International Trade Commission under section 735 of the Tariff Act of 1930 (19 U.S.C. 1673d) relating to imports of the article in question for the country in which the manufacturer of the article is located, which final determination shall be considered a prima facie case for purposes of this Act, the burden of rebutting such prima facie case thus made shall be upon the defendant.

(E) Whenever it shall appear to the court that justice requires that other parties be brought before the court, the court may cause them to be summoned, without regard to where they reside, and the subpoenas to that end may be served and enforced in any district of the United States.

(F) The acceptance by any foreign manufacturer, producer or exporter of any right or privilege conferred upon him to sell his products or have his products sold by another party in the United States shall be deemed equivalent to an appointment by the foreign manufacturer, producer, or exporter of the District Director of the United States Customs Service of the Department of the Treasury for the port through which the article is commonly imported to be the true

and lawful agent upon whom may be served all lawful process in any action brought under this section.

(G)(1) An action may be brought under this section only if such action is commenced within four years after the date on which the cause of action accrued.

(2) The running of the statute of limitations provided in paragraph (1) shall be suspended while any administrative proceedings under section 731, 732, 733, 734, or 735 of the Tariff Act of 1930 (19 U.S.C. 1673-1673d) relating to the importation in question, or any appeal of a final determination in such proceeding, is pending and for one year thereafter.

(H) If a defendant in any action brought under subsection (B) fails to comply with any discovery order or other order or decree of the court, the court may—

(1) enjoin the further importation into, or the sale or distribution within, the United States by such defendant of articles which are the same as, or similar to, those articles which are alleged in such action to have been sold or imported under the conditions described in subsection (B) until such time as the defendant complies with such order or decree, or

(2) take any other action authorized by law or by the Federal Rules of Civil Procedure, including entering judgment for the plaintiff.

(I)(1) Except as provided in paragraph (2), the confidential or privileged status accorded by law to any documents, evidence, comments, or information shall be preserved in any action under this section.

(2) The court in any action brought under this section may—

(A) examine, in camera, any confidential or privileged material,

(B) accept depositions, documents, affidavits, or other evidence under seal, and

(C) disclose such material under such terms and conditions as the court may order.

(J) Any action brought under this section shall be advanced on the docket and expedited in every way possible.

(K) For purposes of this section—

(1) The terms "United States price", "foreign market value", "constructed value", "subsidy", and "material injury", shall have the respective meaning given such terms by title VII of the Tariff Act of 1930.

(2) If—

(A) a subsidy is provided to the manufacturer, producer, or exporter of any article, and

(B) such subsidy is not included in the foreign market value or constructed value of such article (but for this paragraph),

the foreign market value of such article or the constructed value of such article shall be increased by the amount of such subsidy.

(L) The court shall permit the United States to intervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

(M) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under

section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).

(Sept. 8, 1916, ch. 436, § 801, 39 Stat. 798[]; ———, 1986, Pub. L. 99- ———, § ———, ——— Stat. ———.)

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 95—COURT OF INTERNATIONAL TRADE

Sec.

1581. Civil actions against the United States and agencies and officers thereof.

1582. Civil actions commenced by the United States.

1583. Conterclaims, cross-claims, and third-party actions.

[1584. Repealed.]

1585. Powers in law and equity.

1586. *Private enforcement action.*

§ 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports on tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930. (Added Pub. L. 96-417, title II, § 201, Oct. 10, 1980, 94 Stat. 1728.)

§ 1582. Civil actions commenced by the United States

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

(Added Pub. L. 96-417, title II, § 201, Oct. 10, 1980, 94 Stat. 1729.)

§ 1583. Counterclaims, cross-claims, and third-party actions

In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the

subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

(Added Pub. L. 96-417, title II, § 201, Oct. 10, 1980, 94 Stat. 1729.)

[§ 1584. Repealed. Pub. L. 97-164, title I, § 135, Apr. 2, 1982, 96 Stat. 41]

§ 1585. Powers in law and equity

The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

(Added Pub. L. 96-417, title II, § 201, Oct. 10, 1980, 94 Stat. 1729.)

§ 1586. Private enforcement action

(a) Any interested party who shall be injured in his business or property by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. 1592) may bring a civil action in the district court of the District of Columbia or in the Court of International Trade, without respect to the amount in controversy.

(b) Upon proof by an interested party that he has been damaged by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930, such interested party shall—

(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into the United States of the articles or products in question; or

(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

(3) recover the costs of suit, including reasonable attorney's fees.

(c) For purposes of this section—

(1) The term "interested party" means—

(A) A manufacturer, producer, or wholesaler in the United States of a like or competing product, or

(B) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product or a competing product in the United States;

(2) The term "like product" means a product which is like, or in the absence of like, most similar in characteristics and uses with products being imported into the United States in violation of section 529(a) of the Tariff Act of 1930; and

(3) The term "competing product" means a product which competes with or is a substitute for products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930.

(d) The court shall permit the United States to intervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

(e) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).

X. VOTE OF COMMITTEE

On March 20, 1986, with a quorum present by voice vote, and without objection heard, the Committee on the Judiciary ordered S. 1655 favorably reported.

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